STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEAN FISHER,

Defendant-Appellee.

UNPUBLISHED
February 28, 2006

No. 257215
Washtenaw Circuit Court
LC No. 04-000429-AR

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In this prosecutor's appeal, plaintiff appeals by leave granted from the circuit court's order affirming the district court's decision not to bind defendant over for trial for operating a motor vehicle while under the influence of a controlled substance, MCL 257.625. We reverse, reinstate the charge against defendant, and remand for trial. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

The essential facts are not in dispute. At approximately 7:00 p.m. on June 26, 2003, the Washtenaw County Sheriff's office received an anonymous report of a car in a ditch on Joy Road. The caller said a person was walking down the road away from the car. A deputy arrived at the scene at approximately 7:30 p.m., finding a maroon Camaro in the ditch, defendant in the driver's seat, and two other others nearby with a pickup truck.

Defendant told the deputy that he was on his way home when the accident occurred, then walked to his home nearby to get help from the two individuals in the pickup truck. Defendant showed obvious signs of intoxication, but initially denied having been drinking. No alcoholic beverages were found in the vehicle or on the road. But after defendant failed field sobriety tests, he admitted to having had one drink. A breathalyzer test administered at 9:00 p.m. revealed a blood alcohol level of .22, more than twice the legal limit for drivers. See MCL 257.625(1)(b).

The district court dismissed the case against defendant on the ground that there was insufficient evidence to show that defendant was intoxicated while operating the vehicle, citing *People v Moore*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2002 (Docket No. 232814). The circuit court affirmed.

In reviewing a district court's decision whether to bind a defendant over for trial, the circuit court examines the entire record of the preliminary examination to determine whether the district court's decision constituted an abuse of discretion; we review de novo the circuit court's determination whether the district court abused its discretion. *People v Green*, 260 Mich App 392, 401; 677 NW2d 363 (2004).

A defendant must be bound over for trial if, at the conclusion of the preliminary examination, probable cause exists to believe that the defendant committed the crime. *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged." *Id.*, citing MCL 766.13; MCR 6.110(E).

In *Moore, supra*, the unpublished decision on which the district court relied, the defendant's car was observed traveling over a police station's lawn, but no driver could be identified. The car was traced to the defendant, who lived near the station. The police went to the defendant's house, and discovered a car with a warm engine, apparently recent damage, and wet mud in the wheel wells. When the police contacted the defendant, the latter smelled of intoxicants and admitted he had been drinking. Defendant admitted remembering having driven the car, but not any resulting accident. *Moore, supra*, slip op at 1. This Court affirmed the circuit court's reversal of defendant's conviction on the ground that there was insufficient evidence to prove that the defendant was driving while intoxicated. *Id.*, slip op at 2.

This case is distinguishable from *Moore, supra*, because there is no dispute that defendant admitted to the police deputy that he was driving the car when it went into the ditch. Moreover, because *Moore, supra*, is an unpublished case, it lacks the force of stare decisis. MCR 7.215(C)(1).

In *People v Solomonson*, 261 Mich App 657, 600; 683 NW2d 761 (2004), the defendant was found asleep at 3:45 a.m. in a car parked beside a road, with an empty beer can in the back and five full, cold cans on the passenger seat. The defendant admitted that he had been drinking since the evening before, but maintained, without corroborating evidence, that someone else drove him to the location where the police found him. *Id.* at 660-661. The instant defendant likewise offers no evidence to suggest that his undisputed state of heavy intoxication resulted entirely from his actions after the accident but before he was confronted by the police.

As noted by this court in *Solomonson, supra*, "the prosecution need not disprove all theories consistent with defendant's innocence; it need only introduce sufficient evidence to convince a reasonable jury of its theory of guilt despite the contradictory theory or evidence a defendant may offer." *Id*. at 662-663. We additionally surmised that "the jury must have concluded from the circumstantial evidence and reasonable inferences that the prosecutor met his burden of proving defendant was operating the vehicle in an intoxicated state *before* the police arrived." *Id*. at 663 (emphasis in the original). Similarly, in this case, evidence that someone was walking away from defendant's car a half-hour before the police found defendant in it, considered along with defendant's admission that he had indeed walked from, then returned to, the scene after the accident, along with his plain state of intoxication when the police found him, constituted circumstantial evidence that defendant was drunk when he drove the car. Defendant has yet to advance the theory that he did his drinking only after driving his car into the ditch, but

if that is the basis for rebutting the obvious inference that defendant was drunk at the time of the accident, it is for defendant to propose and support, not for the prosecutor to disprove.

Also instructive is *People v Schinella*, 160 Mich App 213; 407 NW2d 621 (1987). In that case, the police found the defendant behind the wheel of a car that was straddling a ditch, at approximately 5:30 a.m. The engine was not running, but there were indications that the defendant had recently attempted to dislodge the vehicle. Although there were no alcoholic beverages in the car, the defendant showed signs of intoxication, failed sobriety tests, and admitted drinking five beers before beginning his trip home. *Id.* at 214-216. We framed the question as "whether there was sufficient direct or circumstantial evidence that defendant *had* operated his vehicle while under the influence at some point *before* he was arrested," *id.* at 216 (emphasis in the original), and concluded that there was sufficiently "strong circumstantial evidence that his driving, or attempt to drive, had ended a few minutes earlier," *id.* at 217.

In the instant case, there was evidence that shortly before the police deputy arrived, defendant, in a state of intoxication, was trying to dislodge his vehicle, apparently with the help of the men in the pickup truck. Defendant told the deputy that the accident occurred while he was driving home, and that he had walked home to obtain assistance. An anonymous caller reported seeing someone walking from the car a half-hour before the police arrived on the scene. A jury could reasonably infer from this circumstantial evidence, plus defendant's own statements, that the accident occurred just a half-hour before the police appeared. The obvious indications that defendant was drunk when the police found him, coupled with his admission to having consumed alcohol only after he failed field sobriety tests, more logically support the conclusion that defendant was drunk when the accident took place than that he chose to consume a large quantify of alcohol between having the accident and returning to try to free his car.

A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). In this case, the district court's reliance on a distinguishable, unpublished case of this Court, and its failure to find probable cause in light of the circumstantial evidence plus defendant's statements, was an error of law. The circuit court likewise erred in affirming.

We reverse the circuit court and the district court, reinstate the charge against defendant, and remand for further proceedings. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey